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Professional Liability Monthly

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IN THIS MONTH'S EDITION

FEATURED ARTICLES

Liability Risks of Electronic Health Records

Electronic health records, or "EHRs," have become increasingly utlized in the practice of medicine in recent years.

Click here to read the rest of this article.

Guidance For Agents Regarding E&O Exposure

Minimizing an insurance agent or broker's errors and omissions (E&O) exposure due to an insurer's insolvency has been a long-standing concern of insurance agents and brokers.

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Professional Liability Monthly provides a timely summary of decisions from across the country concerning professional liability matters. Cases are organized by topic, and where available, hyperlinks are included providing recipients with direct access to the full decision. In addition, we provide the latest information regarding news in the professional liability industry. We appreciate your interest in our publication and welcome your feedback. We also encourage you to share the publication with your colleagues. If others in your organization are interested in receiving the publication, if you wish to receive it by regular mail, or if you would like to be removed from the distribution list, please contact Brian R. Biggie.

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ARCHITECT AND ENGINEER LIABILITY

Court Refuses Design Professional's Bid to Avoid Liability Reliant on Future Inspection or Approvals

GRANGER CONSTRUCTION COMPANY, INC. v. G.C. FIRE PROTECTION SYSTEMS, INC., et al.
(N.D.N.Y., January 15, 2014)

The Federal Court for New York's Northern District denied *pro se* defendant engineer's motion to dismiss due to a plaintiff's failure to state a cause of action.

The defendant was retained by a general contractor to erect a hotel in Vestal, New York. The contractor hired an engineer for general services who in turn hired the defendant/movant to design the fire protection system. The defendant was a licensed engineer and qualified to perform the services for which he was retained. However, he sealed and approved designs which neither complied with the relevant code nor the construction documents. In other words, the defendant signed off on a faulty fire protection system.

The defendant moved for dismissal on the grounds that it owed no duty to the plaintiff and was thus not liable in tort. And, because the defendant had no contract with the plaintiff, there was similarly no duty or privity owing in contract law.

Typically, plaintiffs may not eat their cake and have it too, so to speak, in that they may not allege causes of action sounding in both tort and contract law with any expectation that both will prevail. Duties breached in tort are not addressed utilizing contract law and vice-versa.

Without specifically saying so, the court here applied the doctrine of quasi privity first cited by the Court of Appeals in *Ossining Union Free School District v. Anderson,* which held that suits could proceed against a party with which no privity exists where, as here, there is knowledge by the defendant that its services were for a specific benefit and particular purpose. The analysis is more involved, but the Northern District was satisfied that the plaintiff's tort claim against this *pro se* defendant could stand on that analysis.

The court also denied the defendant's argument that its flawed drawings would not have caused any damage because of the many lines of scrutiny the building and the drawings would undergo prior to construction, finding no authority to hold building inspectors to a standard of perfection.

Finally, the court raised and disposed of an argument suggesting that the plaintiff was not a third-party beneficiary of the defendant's contract with the subcontractor. It held that third-party beneficiary status is more broadly found between a prime contractor and a sub-subcontractor when the service of the sub-subcontractor is necessary for the subcontractor and the prime contractor to complete the contracted services.

The court ignored the raft of cases which permit recovery notwithstanding the economic loss doctrine in instances where safety risks are at issue. Courts routinely create duties where none would otherwise exist in favor of ensuring that personal safety issues are taken very seriously. This line of cases would have applied lock and key to the instant facts.

Impact: The first lesson learned in this case is to retain counsel. The court did not give the movant the respect his arguments deserved, nor did it fully address the issues presented by this motion. The second lesson learned is that it is always good practice to include contract provisions that expressly preclude third parties from enjoying third-party beneficiary status — i.e., "nothing in this agreement is intended to confer any benefit to any other person or entity." Finally, and this goes without saying, you may not rely on a system of checks and balances to correct your work. Be thorough. Be right.

ACCOUNTANT MALPRACTICE

A Plaintiff's Complaint Alleging Defamation and Violations of Connecticut's Unfair Trade Practices Act Is Stricken Under the Absolute Litigation Privilege

MEYERS, HARRISON & PIA, LLC v. RIELLA
(Conn. Super., November 7, 2013)

The plaintiff in this case, Meyers, Harrison & Pia, an accounting and business evaluation firm, sued the defendant, a tax and accounting firm and one of its majority shareholders, alleging defamation and violations of the Connecticut Unfair Trade Practices Act. The parties were retained by the opposing litigants in two separate divorce proceedings. The plaintiff was retained as an expert and prepared business valuation reports in each divorce proceeding. The defendant was retained to prepare a rebuttal report, and in each case the report stated that the plaintiff's reports did not meet industry standards, did not follow valuation principles, were inherently flawed, and therefore not valid. In the second proceeding, the defendants' report further stated that the plaintiff charged unreasonable fees for unnecessary work in preparing its report.

The plaintiff further alleged that the defendant in the second action, Mr. Mills, brought suit against the plaintiff and disclosed the defendant as his expert witness. The plaintiff in this action brings an additional claim that the defendant encouraged and assisted Mr. Mills in bringing that action and engaged in the practice of disparaging the

services provided by the plaintiff by making and publishing false statements.

The defendant moved to strike the entire complaint based on the absolute litigation privilege, arguing that it shields individuals from liability for statements made during the course of judicial proceedings. The defendant further argued that it was immune from CUTPA liability as the acts alleged were not entrepreneurial in nature. The plaintiff objected to the defendant's motion arguing that the privilege does not apply to individuals who are not attorneys and does not apply to the types of statements at issue in this case.

The court granted the defendant's motion to strike the complaint based on the absolute litigation privilege, stating that case law has long recognized that statements made during the course of a judicial proceeding are privileged as long as they are in some way pertinent to the proceeding. The court discussed the public policy reasons behind such a rule, and also noted that reports submitted in connection with a judicial proceeding are also absolutely privileged. As the plaintiff's complaint centered only on the defendant's reports submitted to the court during the proceeding, and while the plaintiff complained that the reports contained false and fraudulent statements, the court stated that the accuracy of the reports is irrelevant to the applicability of the privilege. The court also disabused the plaintiff of the argument that the reports were not pertinent to the proceeding, stating that the validity and methodology of the plaintiff's conclusions was a pertinent topic before the court.

With respect to the plaintiff's allegations that the defendant encouraged and aided Mr. Mills in bringing suit against the plaintiff, the court noted that the allegations were mere conclusions and that the privilege applies to statements made preliminary to a proceeding if they bear some relationship to the proceeding. As the plaintiff's complaint asserted that only reports were created by the defendants, this allegation did not take the matter outside the privilege.

The court briefly commented on the plaintiff's argument that the policy provisions do not favor extension of the privilege to the defendant's conduct as this argument is contrary to established case law.

The court also addressed the CUTPA allegations in order to determine if they fell within the entrepreneurial exception to the immunity accorded accountants under CUTPA. The court stated that the nature and manner of the reports, no matter what their content, do not involve the entrepreneurial aspects of the defendant's business, and therefore, struck the CUTPA count on this additional ground.

Impact: This case is important as more lawsuits are being brought against the opposing party's expert, medical and non-medical alike. In this instance, shortly after the decision issued, the defendant filed a motion for judgment, and before the court could enter judgment, the plaintiff voluntarily withdrew its lawsuit. This case has excellent language dealing with the applicability of the privilege to all witnesses before and during a judicial proceeding so long as the statements bear relation to the proceeding, and should be liberally cited when such a case is brought in the future.

MEDICAL MALPRACTICE

Pennsylvania Enacts Benevolent-Gesture Bill Into Law

Pennsylvania joined approximately 36 other states in late December when its newly enacted Benevolent Gesture Law went into effect. The Benevolent Gesture Medical Professional Liability Act (Act 79) implemented what has become known as the "Apology Rule," and permits health care providers to make "benevolent gestures" to patients without fear that their words may be used against them in a subsequent medical malpractice action. The law defines a benevolent gesture as "any action, conduct, statement, or gesture that conveys a sense of apology, condolence, explanation, compassion or commiseration emanating from human impulses," and applies to health care providers, including personal care homes and assisted living residences.

The legislation as enacted creates an evidentiary rule that physicians' sympathetic and empathetic gestures to patients cannot be used in medical malpractice lawsuits. Prior to passage, however, the bill was amended to exclude coverage of any statements indicating fault or negligence made by a treating physician. Andrew Carter, who serves as President and CEO of the Hospital and Healthsystem Association of Pennsylvania, characterized the bill as a significant victory for the state and its hospitals, adding:

> [T]he bill does not prevent any patient from filing a medical liability lawsuit when there is an unanticipated medical outcome … it allows for the kind of open discussion that can lead to resolution without the excessive costs that result when matters are decided in the courtroom.

Interestingly, the scope of Pennsylvania's new legislation may implicate another hot button issue — same-sex partners. The law covers gestures made to patients, a patient's representative (such as an attorney or legal guardian), and "relatives." The bill further defined relatives as a patient's spouse, parent, stepparent, grandparent, child, stepchild, grandchild, brother, sister, half-brother, half-sister, spouse's parent, or any person who has a "family-type" relationship with a patient. Under existing Pennsylvania law, it is not yet clear that a statement made to a same-sex partner would be considered

as a person's "spouse" and within the protection of the law.

Impact: Whether enactment of an "Apology Rule" in Pennsylvania will decrease the number of lawsuits filed against healthcare providers remains to be seen, but there appears to be general consensus that such humane gestures by treating physicians may satisfy a grieving family's desire for closure without subsequent litigation.

Evidence of Informed Consent Inadmissible in Medical Malpractice Case

BRADY V. URBAS
(Pa. Super., November 12, 2013)

In this matter, the plaintiff alleged the defendant negligently performed surgery on her toe, which caused her to suffer severe pain. The plaintiff's complaint sounded in negligence and did not raise a count for informed consent.

Prior to trial the plaintiff filed a motion in limine to exclude informed consent-related evidence. At the plaintiff's deposition she was questioned about the possible risks associated with the subject surgery. Moreover, she was questioned about the consent forms signed before the surgery. The plaintiff argued evidence about her knowledge of any risks was inadmissible because the case was solely based on the substandard quality of care provided by the defendants. In addition, she argued evidence of possible risks of surgery is not a defense in a medical malpractice action. Finally, the plaintiff argued the probative value is outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

The trial court denied the motion in limine and a verdict was entered in favor of the defendants. However, the appellate court reversed because a plaintiff's awareness of the general risks of surgery is not an available defense for a defendant-physician in a medical malpractice matter when the claim revolves around the alleged deviation from the standard of care.

Impact: A defendant in a medical malpractice claim cannot raise a plaintiff's awareness of the risks associated with a surgical procedure when there is no claim based upon informed consent.

LEGAL MALPRACTICE

Case of First Impression: Plaintiffs Lack Standing to Bring Malicious Prosecution/Vexatious Litigation Actions Against Attorneys and Attorneys' Clients

RICHARD SCALISE, et al. v. CUMMINGS & LOCKWOOD, LLC
(Conn. App., February 11, 2014)

Scalise, et al. v. Cummings & Lockwood, LLC, 2014 Conn. App. Lexis 55 (February 11, 2014) and the companion case *Scalise, et al. v. East GreyRock, LLC,* et al., 2014 Conn. App. Lexis 56 (February 11, 2014) are premised upon the defendant firm filing an 18-count complaint against the plaintiffs in 2004 in connection with the plaintiffs' sale of property to the firm's clients.

Before the start of the trial, the parties agreed to arbitrate certain claims and bifurcate the proceedings into separate liability and damages phases. Prior to the arbitration, the plaintiffs filed dispositive motions which resulted in judgments on certain counts in favor of the plaintiffs. The defendant firm reserved the client's right to appeal the court's interlocutory rulings. Following the court's decision on the motions, the matter proceeded to arbitration and the arbitrator found in favor of the plaintiffs on many of the counts. Following the award, numerous motions to confirm and vacate portions of the award were filed.

Ultimately, the court confirmed some of those counts in which the arbitrator found in favor of the plaintiffs, and the defendant waived its right to appeal with respect to those counts. However, the court also refused to confirm the arbitrator's award on some other counts and remanded those counts back to the arbitrator for further factual findings.

The plaintiffs then brought the instant malicious prosecution/vexatious litigation action against the defendant firm and the firm's clients based on their prosecution of the 2004 action. At the time the vexatious litigation suit was brought, the underlying suit still remained pending as the arbitrator still had not made additional findings on the counts remanded back to him by the court, no final award had been issued or confirmed by the court, and a damages hearing had not been held. However, even though the underlying action remained pending, the plaintiffs still sought to recover from the defendant on a theory of vexatious litigation for those causes of action in which court had issued a final confirmation of the award by the arbitrator in their favor and were not remanded back to the arbitrator.

The defendant firm and its clients moved to dismiss the plaintiffs' suit, arguing that it was not ripe for adjudication because the entire underlying suit had not terminated. The defendant firm argued that even though there was final ruling by way of the court's confirmation of the arbitration award in favor of the plaintiffs on some counts of the complaint, because the entire underlying action remained pending, and their clients had not waived their rights to appeal the rulings on the dispositive motions and the arbitrators' award as to the other counts had yet to be confirmed, the plaintiffs had not met the favorable termination requirement and the suit was not ripe. The trial court granted the defendant's motion.

On appeal, the Appellate Court affirmed the trial court, concluding that a condition precedent to the institution of a vexatious litigation action is that the entire original

action has terminated successfully in favor of the party bringing the suit. Citing a lack of legal authority for the plaintiffs' position, the court explicitly rejected the plaintiffs' argument that because some counts of the underlying action had terminated in their favor, they may properly proceed with their vexatious litigation action as to those counts even though the underlying litigation remained pending as to other counts. The court found that the entire underlying litigation on which the plaintiffs based their vexatious claims must fully terminate and therefore the plaintiffs could not proceed with their suit. It also noted that the liability phase of the plaintiffs' suit remained ongoing as the court remanded the action back to the arbitrator for additional findings and the underlying litigation specifically with respect to the dispositive motions was still subject to the possibility of appeal.

In reaching this conclusion, the court looked to the purpose of the favorable termination requirement which included the danger of inconsistent judgments, the use of a vexatious suit as a means for making a collateral attack on judgment in the underlying suit, and the unspoken distaste for rewarding a potentially "guilty party" with damages. Here, the court held that both of these concerns would be implicated if the plaintiffs were allowed to continue with this litigation and would vitiate the purpose of the favorable termination requirement.

Notably, the court (in a footnote) did acknowledge that there is case law that allows a plaintiff to proceed, in limited circumstances, with a vexatious litigation action when the plaintiff had prevailed on some but not all claims. However, the case law cited refers to the limited circumstances in which the law will allow a plaintiff who has not completely prevailed in the underlying action to bring a vexatious litigation action on those counts on which he did prevail so long as they are "logically severable" from the counts in which he did not prevail once the entire action is over.

Impact: This case is important as it is a case of first impression dealing with the factual application of the favorable termination of the underlying proceeding requirement in malicious prosecution actions. It should stop others from filing vexatious litigation actions while the underlying action is on-going in order to gain leverage in the underlying case.

Court Finds Theory of Apparent Agency Applicable in Medical Malpractice Context

NTUMBANZONDO V. CHAU
(Conn. Super., January 7, 2014)

The defendant, Bang Chau, M.D., is an employee of co-defendant Northeast Emergency Medicine Specialists (NEMS), a private practice group of physicians who provide emergency medical staffing to co-defendant Windham Hospital. Dr. Chau treated the plaintiff's decedent at Windham Hospital and the plaintiff claimed that Dr. Chau's treatment was negligent. The plaintiff sought to hold Windham Hospital liable for Dr. Chau's negligence. Windham Hospital filed a motion for summary judgment arguing that it could not be held liable under theories of actual or apparent agency.

Although the court found that Dr. Chau was not an actual agent of Windham Hospital, the plaintiff argued that the hospital was liable for Dr. Chau's conduct under the theory of apparent agency. The court noted that such a determination required a discussion regarding whether: (1) apparent agency is recognized in Connecticut; and (2) if apparent agency exists in Connecticut, whether the decedent was required to rely on the apparent agency relationship between Dr. Chau and NEMS in order for the doctrine to apply.

The court noted that several Connecticut Supreme Court cases had ruled that the doctrine of apparent agency is recognized in Connecticut. Apparent authority is to be determined not by the agent's own acts, but by the acts of the agent's principal. First, it must appear from the principal's conduct that the principal held the agent out as possessing sufficient authority to embrace the act in question, or knowingly permitted the agent to act as having such authority. Second, the party dealing with the agent must have, acting in good faith, reasonably believed, under all the circumstances, that the agent had the necessary authority to bind the principal to the agent's action.

Despite the several Connecticut Supreme Court cases recognizing the doctrine of apparent authority, the Connecticut Appellate court recently noted in *L&V Contractors, LLC v. Heritage Warranty Ins. Risk Retention Group, Inc.*, 47 A.3d 337 (Conn. App. 2012) that Connecticut has yet to apply the doctrine of apparent authority to allow for a principal to be held liable to a third person who was harmed by the tortious conduct of a person held out as the principal's agent. Consequently, the court noted that there is currently conflicting authority regarding the validity of the doctrine of apparent authority. The court noted that there is no appellate authority in Connecticut on this doctrine as it applies to tort liability in a medical malpractice context. Despite the lack of appellate guidance, numerous superior courts have addressed whether a hospital can be held vicariously liable under a theory of apparent agency and have held that medical malpractice claims may be asserted on the basis of apparent authority.

Having established that apparent authority is a viable theory for alleging vicarious liability against hospitals for the actions of independent contractors in Connecticut, the court next addressed the hospital's argument that the decedent did not rely on the apparent agency relationship between Dr. Chau and NEMS because she was unconscious. It noted that on a motion for summary judgment, the burden was on the moving party — in this case, the

hospital — to show the nonexistence of any issue of fact. The court noted that by making this argument, the hospital was attempting to shift the burden to the plaintiff by arguing that the plaintiff was required to establish reliance on the apparent agency relationship. The court found that the hospital did not meet its burden because it had not submitted any evidence that showed that the decedent did not rely on the apparent agency relationship between Dr. Chau and NEMS.

In addition, the hospital did not provide evidence that the decedent was actually unconscious at all times when she was at the hospital. The court noted that even assuming, *arguendo*, that the decedent was unconscious the entire time, Connecticut courts do not require a plaintiff to prove detrimental reliance. In fact, one superior court case has held that a plaintiff is not required to make a showing of any kind of reliance in order to recover on a theory of apparent agency.

The court concluded that the record raised factual issues regarding the existence of an apparent agency relationship between Dr. Chau and the hospital. Thus, the hospital's motion for summary judgment was denied.

Impact: This case illustrates that a hospital may be held liable for the malpractice of a non-employee under a theory of apparent agency, even if the plaintiff did not rely on the apparent agency relationship.

Fiduciary Duty Claims and Trade Violations Brought by Individual Unit Owners Not Permitted Against Directors of Condominium Association

WOJECK v. LATIMER POINT CONDO ASSOC.
(Conn. Super., January 7, 2014)

The plaintiffs owned a condominium unit in the Latimer Point Condominium Association, a common interest ownership community located on the Long Island Sound shoreline in Stonington, Connecticut. Latimer Point consists of real property owned by members of the association.

The association is managed by a board of directors and also has an Architectural Control Committee (ACC), a standing committee of the association that processes and manages all building and construction applications made by the members. The association is the reviewing authority of all decisions by the ACC. The association and the ACC are governed by bylaws with respect to construction and building applications and must follow a specific sequence involving those applications. Notably, the bylaws also include a 10 percent rule to protect the members' water view from obstructions, including the renovation and construction of new buildings. The rule mandates that no members' water view will ever be diminished by more than 10 percent due to the cumulative construction on other units or association property.

In 2011, the plaintiffs were provided with a purported construction application by their neighbors which included, among other things, a plan to increase the roof height of the neighbors' unit. The proposed construction would have been directly within the plaintiffs' water view. The plaintiffs objected to the application and a hearing was held by the ACC. After the hearing, an amended application and construction plans were provided to the ACC and the ACC met again to review the amended plans. The ACC granted the application despite the fact that it did not first determine whether the new construction impacted the plaintiffs' water view as required by the bylaws. On appeal, the board upheld the ACC's granting of the application.

Following the granting of the neighbors' application, the plaintiffs brought suit against the association board, the ACC, and the individual members of both the associations board and the ACC, claiming, among other things, that the defendants breached their fiduciary duty to the plaintiffs and violated Connecticut's Unfair Trade Practices Act (CUTPA). The individual defendants moved to strike all of the claims against them asserting that under a Connecticut statutory provision which precluded direct actions against unit owners, they could not be sued in their individual capacity. All of the defendants moved to strike the plaintiffs' breach of fiduciary duty claims and claims alleging violations of CUTPA.

In support of their motion all of the defendants argued first that they could not be held liable for a breach of fiduciary duty because they did not owe a fiduciary duty to the plaintiffs. The defendants next argued that the plaintiffs had failed to set forth violations of CUTPA because they did not allege that the defendants were engaging in entrepreneurial conduct or advertising that would amount to acts of commerce or trade under the statute. In addition, the plaintiffs failed to set forth factual allegations that they suffered an ascertainable loss as required by the statute.

The plaintiffs objected to the defendants' motion. Specifically, the plaintiffs argued that they were not precluded from suing the defendants in their individual capacity because the statute only precluded the plaintiffs from suing individual owners of units within the association, not individuals serving on the association's board in their capacity as board members. The plaintiffs also argued that the defendants owed a fiduciary duty to the plaintiffs by virtue of the bylaws and that the 10 percent rule in the bylaws created a de facto fiduciary relationship between the plaintiffs and the defendants.

Additionally, the plaintiffs argued that they could maintain their claims under CUTPA because some lower level courts found that conduct of condominium associations could be considered trade or commerce within the meaning of the statute. The plaintiffs

further argued that they had demonstrated that they did suffer an ascertainable loss because they pled that the conduct of the defendants adversely impacted the value of their property.

The court agreed with the defendants and granted the motion to dismiss. The court first concluded that the plaintiffs could not maintain their action against the individual defendants. The court found that a Connecticut statutory provision precluded a direct action against any individual unit owner in an association arising out of any wrong committed by a condominium association and that this statute was applicable to the plaintiffs' claims against the individual association board members. In so holding, the court rejected the plaintiffs' argument that the statute did not preclude the plaintiffs from suing the individual unit owners in his or her capacity as a member of a regulatory body for the association. The court asserted that the plaintiffs were asking the court to read an exception into the statute that did not exist and that the plain language of the statute precluded a direct action against the individual unit board members. The court found that under the plain language of the statute all counts of the complaint against the individual board members could not survive.

The court next concluded that the plaintiffs' claim of breach of fiduciary duty against the association and the ACC were similarly deficient. The court first found that the plaintiffs failed to set forth facts demonstrating that the association's board or the ACC owed the plaintiffs a fiduciary duty. Citing to other superior court decisions and Connecticut's Common Interest Ownership Act, the court found that while the association's board owed a duty of care and loyalty to the association itself, the association's board does not own a duty to any individual owner of a unit within the association. The court agreed that the board did have a duty to follow the bylaws and enforce the 10 percent water view rule, but found that that duty ran to the association and collectively to the unit owners, and not to the individual owners themselves.

Finally, the court concluded that the plaintiffs failed to set forth a cognizable claim under CUTPA. In order to have a claim for a violation of CUTPA the plaintiffs must allege that the defendants were engaging in deceptive acts with respect to trade or commerce. The court found that the condominium association's managerial activities did not amount to activities of "trade" or "commerce" within the meaning of the statute. In addition, while a plaintiff could maintain a cause of action under CUTPA against a condominium association for its entrepreneurial activities such as advertising, or the sale and purchase of units, a plaintiff could not maintain a cause of action under CUTPA for improper conduct relating to the association's managerial duties. The court found that all of the improper conduct set forth by the plaintiffs on the part of the association's board in granting the construction application involved the association's managerial duties and that therefore, CUTPA was inapplicable to the plaintiffs' claims.

Additionally, the court concluded that in order to set forth a cause of action under CUTPA the plaintiffs must also allege that they suffered an ascertainable loss. The court concluded that the plaintiffs' conclusory allegations that they suffered a loss and that the value of their property was adversely impacted were insufficient to demonstrate that they suffered a tangible ascertainable loss. Thus, the court granted the defendants' motion to strike the CUTPA claims as well.

Impact: By concluding that a Connecticut statute precludes a direct action against individual unit owners even if they are members of a condominium association's regulatory board, the court effectively precluded direct actions against condominium associations' board members individually. Additionally, in concluding that board members did not owe a fiduciary duty to individual members, the court also further solidified lower court case law setting forth that an association's board's fiduciary duty only runs to the condominium association. Finally, in refusing to apply CUTPA to the board's conduct in approving the building application, the court makes clear that just as with other professionals, in Connecticut, CUTPA will not apply to managerial conduct undertaken by the board and conduct that is not entrepreneurial in nature.

OTHER CASES OF NOTE …

Pennsylvania Superior Court Upholds Transfer of 19 Asbestos Suits From Philadelphia County to Northampton County

STETTLER, et al. vs. ALLIED SIGNAL, et al.
(Pa. Super., January 21, 2014)

Practitioners familiar with the sometimes confounding rulings interpreting the doctrine of *forum non conveniens* in Pennsylvania courts are now focused on the most recent appellate decision, upholding the transfer of 19 consolidated asbestos cases from plaintiff-friendly Philadelphia County to a more conservative upstate venue. In a noteworthy development remarkable for its candor, plaintiffs' counsel admitted that they filed the more serious cases in Philadelphia "based on counsel's perception that Philadelphia juries would be more sympathetic to plaintiffs than juries might be in Northampton County."

In *Stettler et al. vs. Allied Signal, et al.*, the Superior Court agreed that the consolidated asbestos product liability actions filed against defendants such as Honeywell International and Owens-Illinois belonged in Northampton County, approximately 75

miles from Philadelphia, to facilitate both evidence-gathering and access to fact witnesses.

In upholding the trial court decision, the Superior Court noted that parallel cases were already proceeding in Northampton County, where most of the plaintiffs lived, worked, and sought medical treatment. Furthermore, litigation in Northampton County would permit easier access to witnesses, worksites, and medical records, according to both the trial and appellate courts. In support of their motions to transfer venue, the defendants argued that venue in Philadelphia was inconvenient, vexatious, and oppressive because the actions had no factual relationship with the city, other than the fact that several defendants conducted unrelated business there.

Impact: Motions to transfer venue based upon *forum non conveniens* principles are generally fact-sensitive, and experienced Pennsylvania litigators recognize that opposite results can be, and often are, reached in cases which are factually similar if not identical. Trial courts are vested with great discretion in deciding such motions, and for many years Philadelphia County judges were known for preserving venue even in cases with overwhelming factual ties to more distant counties. More recently, however, Philadelphia County judges have given greater consideration to the factors favoring transfer, especially when admissions of forum shopping are presented as they were here.

Claims Against Horse Instructor Not Professional Negligence

SCHLUMP v. NAIDENE PABST
(Sup. Ct. Conn., December 10, 2013)

The defendant operated a full-service equestrian facility and held herself out as a professional horse instructor experienced in providing riding lessons. The plaintiff was participating in a horse riding lesson with the defendant. At some point during the lesson, the plaintiff attempted to dismount the horse. However, while dismounting she caught her foot in a stirrup and fell off of the horse. The defendant was standing on the right side of the horse when the plaintiff fell. The plaintiff dismounted the horse on the left side per the instructions of the defendant.

Following her fall, the plaintiff brought suit against the defendant. In her suit, the plaintiff asserted that the defendant knew or should have known how to instruct her to dismount the horse, of her need for instruction, of the proper positioning for safely dismounting the horse, and that failing to remove both feet from the stirrups prior to dismounting could lead to the type of injuries sustained by the plaintiff. The plaintiff asserted two causes of action against the defendant in her complaint: negligence and recklessness.

The defendant moved to strike the plaintiff's recklessness count arguing that count sounded in negligence only. Specifically, the defendant argued that the language in the reckless count sounded in a second claim for professional negligence rather than recklessness. The defendant pointed to some of the plaintiff's allegations regarding the defendant's training and experience and argued that these allegations pertaining to the defendant's specialized training and experience demonstrated that the claim was actually a claim for professional negligence. The plaintiff opposed the motion and argued that the count sufficiently set forth reckless conduct on the part of the defendant. The plaintiff argued that the claims were not claims of professional negligence but, rather, that the facts regarding the defendant's specialized training and instruction pertained only to the defendant's state of mind and knowledge of the potential consequences of her acts.
The court agreed with the plaintiff and denied the defendant's motion to strike. In denying the motion, the court found that the plaintiff's allegations in the second count did not set forth a claim for professional negligence. The court reasoned that contrary to the defendant's assertion, the allegations regarding the defendant's training and experience did not suggest nor set forth a professional malpractice claim. Instead, the court found that allegations regarding the defendant's knowledge and experience in teaching horse riding lessons went to the defendant's state of mind, and if proven would enable a fact finder to infer that the defendant was aware of an increased likelihood of injury resulting from her conduct. The court found that the allegations demonstrated that the defendant, as a result of her familiarity with the risks associated with the act of dismounting a horse, possessed the requisite state of consciousness regarding the consequences of her acts. Accordingly, the court rejected the defendant's claim that the plaintiff had set forth a claim of professional negligence and denied the defendant's motion to strike.

Impact: In rejecting the defendant's argument that the plaintiff had set forth a claim of professional negligence, the court implicitly rejected that horse instructors are professionals and can be sued for malpractice. Additionally, the court also confirmed that allegations of specialized training and skill do not necessarily demonstrate a professional negligence claim.

Liability Risks of Electronic Health Records

By Sandra Snaden Kuwaye

Electronic health records, or "EHRs," have become increasingly utilized in the practice of medicine in recent years. EHRs are integrated computer systems that permit medical practitioners to store patient data and also enable them to utilize the records to make treatment decisions and to be alerted to potential dangers. EHRs also permit patients to access their medical information remotely.

The enactment of the Health Information Technology for Economic and Clinical Health (HITECH) Act in 2009 created an incentive program which will pay providers and hospitals for using EHRs when treating Medicare and Medicaid recipients in order to promote "meaningful use" of EHRs. As a result, more and more providers are transitioning to the use of EHRs. In order to receive the incentives, providers must meet certain core objectives, such as the utilization of electronic prescribing of medications, the computerization of patient information, the use of drug interaction checks, and demonstrating the capability to exchange information electronically with other providers.

The government has invested a considerable amount of money in programs that promote the use of EHRs, hoping that they will increase efficiency, allow better communication between medical providers and pharmacies, and reduce errors. The Office of the National Coordinator for Health Information Technology, which was established by the Department of Health and Human Services, is striving to have all medical providers transition to EHRs in 2014.

Although EHRs are touted as the best way to make the health system safer and more efficient, the rise of this technology has understandably created questions relating to medical providers' malpractice liability. This article will explore the many ways in which EHRs may increase a medical provider's exposure to liability.

One of the most significant areas of potential exposure for practitioners using EHRs is the fact that, through these records, medical providers have available to them an exponentially larger volume of data regarding a patient. This leads to the question of whether the provider is obligated to review all of the information when treating the patient. If the practitioner fails to review the full record and, as a result, is unaware of critical information that could have impacted the patient's treatment, the practitioner could be held liable. Compounding this problem is the fact that potentially important information might be buried in a voluminous record, making it difficult to locate.

Other potential liability risks include the fact that email exchanges with patients greatly increase the number of clinical encounters that could give rise to potential claims. These encounters may increase the risk of claims if advice is provided by the medical practitioner without thorough investigation and examination of the patient. Also, failure to reply to patient emails in an expeditious manner may constitute negligence and cause patient dissatisfaction. Additionally, more extensive documentation of clinical decisions and activity generates more evidence that can be obtained by a plaintiff during discovery, including metadata.

EHRs also create a temptation to cut and paste patient histories instead of taking new information, which creates the risk that the practitioner may perpetuate incorrect information and also fail to obtain new information. Widespread use of EHRs may also create a duty for medical providers to search for patient information prepared by other providers. As the technology becomes more prevalent, it is even possible that courts might find that the failure to adopt and use EHRs may itself constitute a breach of the standard of care. (See Mangalmurti SS, Murtagh L, Mello MM, *Medical Malpractice Liability in the Age of Electronic Health Records*, N. Engl. J. Med. 363;21 (Nov. 18, 2010.))

Technology issues are another challenge facing practitioners who use EHRs. The rise of EHRs has also resulted in the rise in the availability of computer programs and IT systems designed to implement the technology. However, according to a study by the Institute of Medicine:

> Poorly designed, implemented, or applied, health IT can create new hazards in the already complex delivery of health care, requiring health care professionals to work around brittle software, adding steps needed to accomplish tasks, or presenting data in a nonintuitive format that can introduce risks that may lead to harm. As health IT products have become more intimately involved in the delivery of care, the potential for health IT-induced medical error, harm, or death has increased significantly. (Inst. Of Med., Natl. Acad. Of Sci., *Health IT and Patient Safety: Building Safer Systems for Better Care* 22 (Nov. 2011), www.iom.edu/HITsafety)

Technology problems in the form of system crashes can result in serious delays in the treatment of patients, increasing risk for practitioners. Information regarding a patient learned while systems are down may not get remembered or recorded once the systems are back up and running. Even when the IT systems are working properly, they are often not user-friendly, causing

additional headaches for practitioners. According to the Institute of Medicine study:

> [Non-user friendly programs] can lead to clinicians spending time unnecessarily identifying the most relevant data for clinical decision making, potentially selecting the wrong data, and missing important information that may increase patient safety risks. If the design of the software disrupts an efficient workflow or presents a cumbersome user interface, the potential for harm rises. … [P]oor usability … is one of the single greatest threats to patient safety. (Inst. Of Med., supra, at 81)

EHRs also increase the risk of data breach violations. Because electronic data is more easily stolen, physicians may be required to meet a higher standard of protective care. Doctors must take appropriate steps to protect patient privacy. In order to comply with HIPAA, online communications with patients must use a secure network. A medical provider sending email or text messages to a patient is responsible for ensuring the identity of the person to whom the message is sent. Before communicating with a patient online, a practitioner should obtain the patient's written consent, detailing the appropriate use of email. For example, patients should understand that email should not be used in emergency situations. The medical provider should use appropriate judgment in determining which patients and what issues are appropriate for online discussion.

In sum, while EHRs may improve efficiency and can result in improved care of patients, they impose more obligations on a medical provider to review a greater amount of information and also to vigilantly protect patient data. Medical providers as well as attorneys should anticipate a varied and shifting landscape of liability risks as the use of EHRs becomes more widespread.

Guidance For Agents Regarding E&O Exposure

By Colleen M. Murphy and Fallyn B. Cavalieri

Minimizing an insurance agent or broker's errors and omissions (E&O) exposure due to an insurer's insolvency has been a long-standing concern of insurance agents and brokers. Questions that insurance agents and brokers have posed about recent downgrading of carriers in the A.M. Best ratings have brought insurer insolvency issues to the fore.

It is important for insurance agents and brokers to understand what their legal duties are in the specific states in which they are selling insurance, and whether any state statutes exist providing that that insurance agents or brokers must advise of insureds of insurer insolvency. (e.g. Mich. Comp. Laws Ann. § 500.8123).This article does not provide legal advice in this regard, but presents a summary overview for educational purposes.

According to a leading case on insurer insolvency and liability of an insurance agent or broker, *Higginbotham & Assoc. v. Greer*, 738 S.W.2d 45 (Tex. App. 1987):

The general rule is that an insurance agent or broker is not a guarantor of the financial condition or solvency of the company from which he obtains the insurance. He is required, however, to use reasonable skill and judgment with a view to the security or indemnity for which the insurance is sought, and a failure in that respect may render him liable to the insured for resulting losses. Thus, where a policy is procured in a company known to be insolvent, the agent is liable for a loss suffered by reason of such insolvency.

On the other hand, where the company was solvent when the policy was procured, its subsequent insolvency generally does not impose liability on the agent or broker. In *Greer*, the court held that:

> [A]n agent is not liable for an insured's lost claim due to the insurer's insolvency if the insurer is solvent at the time the policy is procured, unless at that time or at a later time when the insured could be protected the agent knows or by the exercise of reasonable diligence should know, of facts or circumstances which would put a reasonable agent on notice that the insurance presents an unreasonable risk.

Accordingly, it is imperative that insurance agents or brokers determine that the insurer is presently solvent when placing the insurance. This is especially true for any new companies with which you are contracting.

In addition to imposing a duty upon insurance agents or brokers to ascertain that the insurer is solvent at the time of placement, some courts have found that an agent has a duty to determine that the insurer is licensed in the state or complies with the surplus lines statutes for the state. Good E&O loss control practices call upon insurance agents and brokers to perform such an analysis across the board. The prudent insurance agent or broker will also investigate the excess and surplus lines broker utilized and obtain a copy of their E&O policy.

Some courts have held insurance agents and brokers liable for failing to consider and inform the insured of the effects and potential risks of obtaining insurance from an unlicensed carrier. (See, for example, *Al's Café, Inc. v. Sanders Ins. Agency*, 820 A.2d 745 (Pa Super. Ct. 2003), in which the court held that an insurance agent had a duty to advise the insured that by failing to use an insurer licensed in Pennsylvania, the insured was forfeiting the protection — should the insurer be placed into insolvency — of up to $300,000 made available to

insureds of Pennsylvania-licensed casualty insurers by the Pennsylvania Property and Casualty Insurance Guarantee Association, and a defense to claims made against the insured.)

Insurance agents and brokers must strive to comply with the statutory surplus lines requirement of the involved state. In addition, insurance agents and brokers should advise their insureds in writing as to why the non-admitted or unauthorized insurer is being selected, what you know about the insurer's financial condition, and that the state's guaranty fund will not respond if the carrier becomes insolvent. The Big I has a form Excess and Surplus lines waiver letter for your reference. You may also wish to consult with your E&O carrier or E&O counsel to obtain such forms in compliance with the particular laws of your state(s).

Although a majority of courts have found no continuing duty to monitor the solvency of the insurer, a minority of courts have held that an agent has a duty to inform an insurer if the agent is aware or reasonably should have been aware of a subsequent insurer insolvency. (See, for example, *Kinder Mortgage Co. v. Celestine*, 635 So.2d 527 (La. Ct. App. 1994), in which a broker "had reason to suspect [insurer] would become insolvent. Yet, it did nothing. It did not notify its customers, nor did it attempt to find suitable replacement coverage for its customers.")

In those states where the insurance agents and brokers have a duty imposed to monitor the solvency of insurers, whether imposed by common law or statute, they must exercise reasonable care, skill and diligence in so doing. A.M. Best is only one source of information to evaluate the insurer's financial condition. A potential financial difficulty indicator is one or more reductions in the insurer's A.M. Best's rating in the last three to five years. Moreover, however, there are a number of other potential financial difficulty indicators in the areas of:

- Market conduct (e.g., attempted large-scale mid-term cancellations)
- Underwriting and pricing changes (e.g., dramatic increases/decreases in agency binding and/or underwriting authority)
- Agency/company transactions (e.g., cash flow problems, slow return of unearned premiums, commissions, etc.)
- Claims handling and loss reserving (e.g., denials of obviously covered claims)
- Organizational changes (e.g. suspicion of fraudulent or criminal activity)
- Financial conditions/performance (e.g., abnormal results on four or more NAIC tests)
- Third-party information (e.g., coverage refusals by umbrella/excess carriers over company's primary coverage)

In those states where an insurance agent or broker has no duty to monitor the insolvency of insurers with which they have placed business, the agency or brokerage may make a business decision to nonetheless do so for its clients. If the agency or brokerage assumes this duty, they should exercise reasonable care, skill and diligence.

The general E&O maxim, "There are no second-class citizens/clients of the agency," applies here. If you are going to monitor the financial condition of insurers and advise only your "best clients," you are creating an E&O exposure for those clients who do not receive such advice. In those instances that the financial condition of an insurer declines significantly, the prudent insurance agent or broker will inform the insureds in writing and offer the insureds the option, where applicable, of insuring through a more financially stable insurer. When discussing the topic of insurer insolvency risks, the "state guaranty funds" will invariably come up. Insurance agents and brokers should fully familiarize themselves with their state's guaranty funds. Guaranty funds typically have territorial limits. For example, in New York and Pennsylvania, the funds only apply to policies issued by an insolvent domestic insurer, or a foreign or alien insurer licensed to do business within the state.

There are also monetary caps on the amount the funds will pay out per claim. For example, Pennsylvania's cap is $300,000 per claim. Moreover, state guaranty funds have short time frames within which an insured may file a claim. In the event of an insurer insolvency, insurance agents and brokers with impacted insureds should promptly contact their E&O counsel and insurers, as well as state associations for guidance.

The insurance agent's last line of defense with respect to E&O loss control for claims arising out of insurer insolvency is the agent's own E&O policy. Be sure yours has sufficiently high limits. Be mindful that E&O carriers, as initially influenced by reinsurers, place insolvency endorsements in E&O policies that provide coverage but excludes coverage where the agent places business with an insurer rated below a certain level, such as a "B+."

The phrase "at the time of placement of such coverage" in such endorsements may be interpreted to mean not only when the policy was initially procured, but also at the time of renewal. Accordingly, insurance agents and brokers should diligently check ratings each year. Once again, in the event that a rating change occurs, agents and brokers should minimize a potential E&O exposure by sending the insureds a letter advising of the insurance company rating downgrade and offering the opportunity to submit an application to another insurer. Agents and brokers may consult with their E&O counsel and E&O insurers for sample downgrade letters.

The issue of insurer insolvency provides an instance where insurance agents or brokers

who may not have a legal duty to monitor insurer insolvency may nonetheless make a proactive business decision to monitor. The decision to do so can result in minimizing E&O exposure and maximizing client retention.

PROFESSIONAL LIABILITY MATTERS

(Click on the headlines below to read the full blog post from Professional Liability Matters*)*

Settlement Voided due to Facebook Post

Facebook strikes again! Just ask a settling plaintiff who learned that his negotiated settlement payment was deemed void as a result of his daughter's Facebook post. According to a recent decision out of Miami, an $80,000 payment was presumptively waived as a result of a post from the plaintiff's daughter broadcasting the "victory" due to a confidentiality clause within the settlement agreement. This is just another example of the serious consequences of inadvertent disclosure of confidential information and the risks of social media.

Shhh … Loose Lips Sink Ships: Confidentiality During Commute

Although studies vary, by most accounts we spend anywhere from 20-50 percent of our waking hours at work. Reportedly, nearly 10 percent of U.S. workers have commutes of 60 minutes or longer and the average one-way commute is about 30 minutes. What does this tell you? We're either working or commuting a great deal. As a result, it's probably no surprise that professionals may gab about work-related issues while commuting. But therein lies the risk.

Search Terms for Sale: Cautionary Tale

Maintaining a website is just the tip of the iceberg for professionals engaged in online marketing. There are many more options available to professionals fishing for business, depending on their technological comfort level. Today's professionals also compete for prime domain names and utilize tools to manipulate "searchability." Commanding that top spot on search engine results can be crucial to a marketing campaign by taking advantage of the reportedly 3-4 billion number of Google searches per day. As a result of these staggering statistics, some firms purchase search terms to quickly direct users to their site. This practice is not free of risk.

Holy Smoke! Employers Refusing to Hire Smokers

A recent trend is developing of late where employers are considering "no smoker" employment policies. These policies go beyond "no smoking in the workplace"; some ban employees from smoking at any time. Such policies may lower insurance premiums. Some employers also suggest that these policies cut down on productivity issues due to smoke breaks and high absenteeism due to smoking-related illnesses. Opponents of these policies argue that they are discriminatory or in violation of privacy laws. This raises an interesting debate.

Are Law Firm Advertisements Covered?

All insurance policies are not created equal. Some policies contain exclusions that many professional may not expect. Take, for example, a recent decision that evaluated whether a law firm's advertising practices were covered under a D&O policy. In *Rob Levine & Associates, Ltd. v. Travelers Casualty*, a Rhode Island federal court considered whether conduct relating to internet and television advertisements was considered "professional services."

Criminal Exposure Arising From Secret Recording

A fundamental risk management pointer is to properly document your file. As a result, many professionals are great note-takers; they follow up conversations in writing, confirm strategy and clearly document instructions. These are all risk aversion tools to protect the professional, to hold others to oral commitments, and provide clarity in future disputes. But, professionals cannot take this too far. There is a difference between jotting notes or confirming conversations on the one hand, and secretly recording or transcribing conversations on the other. Such secret recordings may run afoul of state privacy laws and lead to potential civil and criminal liability.

Winter Wreaks Havoc on Employers

Winter storms create challenges for employees and employers alike, with snow, sleet, and freezing rain adding unwelcome stress and hassles. An employer has certain responsibilities when it comes to responding to weather conditions. To eliminate uncertainty and confusion inside the workplace, employers are advised to create a comprehensive emergency weather plan.

D&O Suits Reach Historic High: Economy to Blame?

The fallout from the 2007-2010 economic downturn is behind us, right? Nope; not so for the professional malpractice community in light of the many lawsuits arising from the recent market collapse. In fact, lawsuits relating to 2007-10 bank collapses in particular have increased dramatically and the primary targets are executives.

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